STATE OF MICHIGAN

SUPREME COURT

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ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff/Appellant,

v.

AUTO OWNERS INSURANCE COMPANY, ~~a Michigan corporation~~,

Defendant/Appellee.

Supreme Court
Docket No._____

Court of Appeals
Docket No. 233826

Lower Court No.: 92-2882 NF
Milwaukee
Hon. Charles D. Corwin

/

MILLER, SHPIECE & TISCHLER, P.C.
WAYNE J. MILLER (P31112)
Attorney for Plaintiff/Appellant
27611 Northwestern Highway, Ste. 200
Southfield MI 48034
(248) 945-1040

DYKEMA GOSSETT PLLC
LORI M. SILSBURY (P39501)
Attorney for Defendant/Appellee
800 Michigan National Tower
Lansing MI 48933-1742
(517) 374-9100

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(39) xapp

(43) supp

NOTICE OF HEARING

APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT BEING APPEALED AND RELIEF SOUGHT

Plaintiff appeals from the unpublished per curiam opinion of the court of appeals, released October 4, 2002, reversing an order of the Missaukee Circuit Court entered March 23, 2001, denying Defendant's motion for relief from judgment entered September 27, 2000. The sole portion of the Court of Appeals opinion being appealed is that portion regarding prejudgment interest.

Plaintiff asks that this Court reverse that portion of the Court of Appeals decision that held that Prejudgment interest does not continue to accrue during the appellate process and affirm the decision of the trial court denying Defendant relief from judgment entered September 27, 2000.

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER PREJUDGMENT INTEREST MUST BE AWARDED FROM THE DATE THE COMPLAINT IS FILED TO THE DATE THE JUDGMENT IS SATISFIED WHERE THE NO-FAULT INSURER DENIED RESPONSIBILITY FOR NO-FAULT COVERAGE, BUT WAS ULTIMATELY FOUND LIABLE.**

Plaintiff-appellant says "yes."

Defendant-appellee says "no."

The lower court said "yes."

The Court of Appeals said "no."

II **WHETHER THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT WHEN THE JUDGMENT INCLUDED AN UNCONTESTED AMOUNT OF PREJUDGMENT INTEREST WHICH WAS PAID BY DEFENDANT AND DETRIMENTALLY RELIED ON BY PLAINTIFF.**

Plaintiff-appellant says "yes."

Defendant-appellee says "no."

The lower court said "yes."

The Court of Appeals did not address

TABLE OF AUTHORITIES

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STATUTES

STATEMENT OF FACTS

Plaintiff-Appellee Alice Morales as Guardian and Conservator of Antonio Morales relies on the statement of facts as they appear in the previous Supreme Court Decision *Morales v Auto-Owners* 458 Mich 288 (1998), the Statement of Facts contained in Defendant-Appellant's Brief on Appeal to the Court of Appeals and the Counter Statement of Facts contained in Plaintiff-Appellee's Brief on Appeal to the Court of Appeals.

Of particular relevance to this appeal are the following:

(1) This is an action on a written instrument, the no-fault contract, existing between Plaintiff and Defendant.

(2) This matter was on appeal for approximately four years between 1994 and 1998.

(3) Ultimately, this Court remanded for a jury trial which was held in February, 2000. The jury found in Plaintiff's favor and judgment affirming coverage for no-fault benefits was entered.

(4) A motion for summary disposition on Plaintiff's entitlement to no-fault penalty interest was filed May 25, 2000. The motion was granted.

(5) On July 12, 2000, an Order was entered for partial summary disposition as to No-Fault Penalty Interest and penalty attorney fees in amounts to be calculated. Prejudgment interest was to be recalculated to reflect the revised amount of the judgment.

(6) On September 27, 2000 the trial court entered a Judgment for the Principal Balance of Benefits Owed through April 30, 2000 and Prejudgment Interest owed through September 1, 2000. The judgment also ordered Auto owners to pay no-fault penalty interest in an amount to be determined and no-fault penalty attorney fees. Auto Owners paid the undisputed portion of the

principal balance on the benefits and prejudgment interest owed through September 1, 2000. The check was issued on September 5, 2000. The payment was promptly disbursed.

(7) On October 17, 2000, Auto Owners filed a Claim of Appeal appealing Auto Owner's liability for no-fault penalty interest and attorney fees. On November 8, 2000 the appeal was dismissed because the judgment entered did not reflect the no-fault penalty interest owed, and therefore, was not "final.".

(8) On December 29, 2000 Defendant Filed a Motion For Relief From Judgment on Prejudgment Interest Entered On September 27, 2000 arguing that interest should be tolled during the appeals process. Defendant requested reimbursement for the prejudgment interest it had voluntarily paid September 5, 2000. Plaintiff argued that the wording of MCLA 600.6013(5) clearly and unambiguously provides for prejudgment interest to run from the date the complaint is filed to the date judgment is satisfied and simply cannot be interpreted to toll interest during the appeals process. Plaintiff additionally argued that irrespective of the clear and unambiguous wording of the statute Defendant's request for relief from judgment must be denied based on Plaintiff's detrimental reliance on the uncontested and voluntary payment of prejudgment interest tendered.

(9) On March 23, 2001 an Order was entered denying Defendant's Motion For Relief From Judgment On Prejudgment Interest entered on September 27, 2000.

(10) On March 26, 2001 A Revised Judgment of Principal Benefits Owed, Prejudgment Interest and No-Fault Penalties was entered.

(11) Defendant Appealed the trial court's decision awarding Plaintiff no-fault penalty interest and attorney fees and the Order denying Defendant's Motion For Relief From Judgement

on Prejudgment Interest entered on September 27, 2000.

(12) Relying on *Dedes v Asch* 233 Mich App 329; 590 NW2d 605 (1998) the Court of Appeals reversed the trial court's denial of Defendant's Motion For Relief From Judgment on Prejudgment Interest entered on September 27, 2000. This Application for Leave To Appeal followed.

ARGUMENT

I. **WHEN JUDGMENT IS RENDERED ON A WRITTEN INSTRUMENT PREJUDGMENT INTEREST PURSUANT TO MCLA 600.6013(5) MUST RUN FROM THE DATE THE COMPLAINT IS FILED UNTIL THE DATE THE JUDGMENT IS ENTERED. THE STATUTE ALLOWS FOR NO EXCEPTIONS.**

THE COURT OF APPEALS DECISION IN THIS CASE IS CLEARLY ERRONEOUS AND WILL CAUSE MATERIAL INJUSTICE IF NOT REVERSED.

A. OVERVIEW

The Court of Appeals decision that prejudgment interest is tolled during the appeals process warrants this Court's review because it is clearly erroneous given the clear and unambiguous language of MCLA 600.6013(5) that prejudgment interest is calculated from the date the complaint is filed until the judgment is satisfied. The Court of Appeals decision further warrants review because the prejudgment interest that the Court of Appeals decision deems tolled was reduced to judgment and voluntarily paid by the Defendant. Plaintiff detrimentally relied on the payment and the Court of Appeals decision will cause material injustice if not reversed. To make this very clear: Defendant paid voluntarily in September, 2000; the payment was disbursed per order of the Bankruptcy Court, and only 4 months later did the Defendant raise this issue. The Court of Appeals decision does not discuss the detrimental reliance issue at all.

The Court of Appeals opinion that RJA prejudgment interest does not run while a case is on appeal is obviously and wildly incorrect. This holding is in violation of an absolutely clear statute (MCLA 600.6013(5)) that ***REQUIRES*** interest to run from the date the complaint is filed until satisfaction of the judgment without exception. The Court of Appeals holding to the contrary is in obvious violation of the clear text of MCLA 600.6013(5). This Court cannot condone such unbridled judicial activism and must reverse.

B. THE RJA PREJUDGMENT INTEREST STATUTE ON A WRITTEN INSTRUMENT PLAINLY AND UNAMBIGUOUSLY PROVIDES FOR INTEREST TO RUN FROM THE FILING OF THE COMPLAINT TO THE SATISFACTION OF THE JUDGMENT

Prejudgment interest is governed by MCLA 600.6013, which states in relevant part[1]:

> "(1)Interest shall be allowed on a money judgment recovered in a civil action as provided by this section....
>
> (5)....if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12%...".

Essentially, what Defendant seeks is a judicial amendment to the plain language of §6013(5), so that it would read:

> ".....if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of judgment....***except while the case is on appeal.***"

Obviously, §6013(5) does not contain the language sought by Defendant-appellee. Defendant-appellee therefore seeks to amend this plainly worded statute. This violates the most fundamental rules of statutory construction. These rules are outlined in *Robertson* v *Daimler Chrysler,* 465 Mich. 732; 641 NW2d 567 (2002):

> " When reviewing matters of statutory construction, this Court's primary purpose is to discern and give effect to the Legislature's intent. Cit Om The first criterion in determining intent is the specific language of the statute. Cit Om The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written. Additionally, it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory. Cit Om. Unless defined in the

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[1]The portion of §6013 (1) that reads "Interest shall be allowed on a money judgment..." was amended in 2002 to read "Interest is allowed on a money judgment...." and that portion of §6013 (5) that reads "interest shall be calculated...." was amended to read "interest is calculated...." These amendments are not relevant to this case.

statute, every word or phrase of a statute will be ascribed its plain and ordinary meaning."Id.

The recent ascendancy of textualism makes the focus on statutory language even more vital:

"Because the Legislature is presumed to understand the meaning of the language it enacts into law, statutory analysis must begin with the wording of the statute itself. Cit om. Each word of a statute is presumed to be used for a purpose, and, as far as possible, effect must be given to every clause and sentence. Cit om. The Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another. Cit om. Where the language of the statute is clear and unambiguous, the Court must follow it. Cit. Om." *Robinson v City of Detroit*, 462 Mich 439; 613 NW2d 307 (2000).

In *Buzzitta v Larizza* 465 Mich 972; 641 NW2d 593 (2002) this Court quoting United States Supreme Court Justice Antonin Scalia explains what it is to be a textualist:

"The philosophy of interpretation I have described above is known as textualism. In some sophisticated circles, it is considered simpleminded---"wooden," "unimaginative," "pedestrian." It is none of that. To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hidebound to realize that new times require new laws. *One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws.* [Scalia, *A Matter of Interpretation: Federal Courts and the Law*, p 23 (Princeton, NJ: Princeton University Press, 1997) (emphasis supplied).]" Id. fn2

In regard to rewriting an unambiguous statute the *Buzzitta* Court held:

"....Nonetheless, courts are bound to apply the statute as written. This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text even where we view the result as "absurd" or "unjust." Cit Om In short, the proper role of the judiciary is to interpret and not rewrite the law. Id.

"The primary rule of statutory construction is that, where the statutory language is clear and unambiguous, the statute must be applied as written." *Cruz v State Farm* 466 Mich 588; 648 NW2d 591 (2002)

"Where the language of a statute is clear and unambiguous, the courts must apply the statute as written" *Putkamer v Transamerica* , 454 Mich 626; 563 NW2d 683 (1997)

"We will not judicially legislate by adding language to the statute." *Empire Iron Mining Pshp. v Orhanen*, 455 Mich 410; 565 NW2d 844 (1997).

There is no Michigan case law or statute providing for prejudgment interest on a written instrument to be tolled during the appeals process. There is, however, a clear and unambiguous statute that states otherwise and numerous cases that prohibit amending that statute to fit the Defendant's purpose

Under these precepts, judicial amendment of a plainly worded statute is impermissible. *Perez v Keeler Brass Company,* 461 Mich 602; 608 NW2d 45 (2000). As Defendant-appellant's position requires such a judicial amendment, Defendant-appellant's position cannot be accepted.

The prejudgment interest statue is a plainly worded statute that clearly requires no interpretation. The language of MCLA 600.6013(5) is clear and unambiguous. "If a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of judgment."

C. DEFENDANT'S AND THE COURT OF APPEALS' RELIANCE ON *DEDES* IS MISPLACED

Notwithstanding the absolutely plain language of the statute ("interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgment"), Defendant's position is essentially that interest should be tolled during the pendency of an appeal. Defendant and the Court of Appeals cite *Dedes*, Supra in support of this dubious position. *Dedes* is factually and legally distinguishable from *Morales* in a number of crucial ways:

First, *Dedes* is a negligence case not based on a written instrument and therefore, not subject to the clear and unambiguous language of §6013(5) "....if a judgment is rendered on a written instrument, interest shall be calculated from the date of filing the complaint to the date of satisfaction of the judgement...." Instead, §6013(***6***) would control. §6013(6) merely states "interest on a money judgment recovered in a civil action shall be calculated at 6-month intervals from the date of filing

the complaint....," arguably subjecting it to interpretation.

Second, *Dedes* does not involve a Defendant who failed to dispute the judgment entered and voluntarily tendered prejudgment interest only to decide months later that it was not calculated correctly.

Finally the *Dedes*' Courts' rationale for finding that the fault of the delay was not attributable to defendants is simply not present in *Morales*. *Dedes* "concerned at least one issue of such significance that our Supreme Court agreed to rule on it following an application for leave to appeal sought by the plaintiffs." Id p. 340. There was no such unforeseen delay in *Morales*. It must be emphasized, however, that even if there were such an issue to cause delay, unlike *Dedes, Morales* is governed by MCLA 600.6013(5) and such a result is simply not permissible. If the legislature had meant for prejudgment interest to toll during an appeal it would have said so.

II THE TRIAL COURT WAS CORRECT IN DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT WHEN THE JUDGMENT INCLUDED AN UNCONTESTED AMOUNT OF PREJUDGMENT INTEREST WHICH WAS PAID BY DEFENDANT AND DETRIMENTALLY RELIED ON BY PLAINTIFF.

Defendant-appellant seeks reimbursement of prejudgment interest it has already paid, essentially arguing that it made a mistake. In *Wilson v Newman,* 463 Mich 435; 617 NW2d 318(2000) this Court summarized the principles regarding restitution of payments made by mistake:

> "As a general rule, a payment made under a mistake of fact which induces the belief that the other party is entitled to receive the payment when, in fact, the sum is neither legally nor morally due to him, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require the refund." Id. 441

In *Wilson* the garnishee life insurer mistakenly paid a judgment on the defendant from funds from two life insurance policies it held on another insurer with the same name. The *Wilson*

Court held:

> "If the Plaintiffs can demonstrate a change of position or detrimental reliance as a consequence of having received the mistaken payment, they may be entitled to retain all or part of the funds mistakenly paid by Allmerica." Id. p 443
>
> The case was remanded to the trial court for further proceedings.

In the instant case there was no mistake of fact relied on by Defendant-appellee. Both parties relied on a clear statute and case law for guidance in calculating prejudgment interest. On September 5, 2000 after a concerted effort of calculations and recalculations a check for $998,152.95 was tendered by Defendant.

Plaintiff had every reason to rely on the payment of prejudgment interest from Defendant. Defendant has disputed nearly every issue in the 11 years since the accident including Plaintiff's entitlement to no-fault interest and penalty attorney fees. Prejudgment interest was among the only issues Defendant did not dispute and in fact worked with Plaintiff to reach an appropriate amount before it was paid and reduced to judgment. Only after Defendant attempted to appeal the trial court decision awarding Plaintiff no-fault penalty interest and was told by the Court of Appeals that the judgment would require an amount of no-fault interest before that portion could be appealed did Defendant decide to appeal the payment of prejudgment interest as well. By the time Defendant filed it's motion for relief from judgment the payment of no-fault benefits and prejudgment interest had been disbursed. This lapse in time was approximately four months.

It is somewhat of an understatement to say that Plaintiff detrimentally relied on the payment. As a result of Defendant's denial of benefits, Mrs. Morales declared bankruptcy several years ago and the money tendered by Defendant was forwarded to the trustee to be dealt with accordingly. The trustee in bankruptcy obtained an order from the bankruptcy court authorizing distribution. Should the Court order repayment of the money, the Bankruptcy Court would have to be enjoined

appropriately.

Defendant-appellee has characterized the result in this case as an "interest windfall" for the Plaintiff-appellant. It would not be inappropriate to remind the Court at this juncture that we are now approaching the 11th anniversary of the motor vehicle accident which is the subject of this litigation. The check in satisfaction of the judgment in this case came after approximately 9 years of litigation. During this time, Plaintiff-appellee entered bankruptcy. Numerous heroic professional service providers undertook to care for Mr. Morales with nothing more than a prospect of ever getting paid. Defendant-appellant won a couple of battles along the way, but lost the war. In losing the war, they remain responsible for the various penalties that come with losing. They don't get "credit" for winning battles with what turned out to be the losing argument. And the thought that Plaintiff-appellee gets any sort of "windfall" after what she and all who she represents have been through is rather offensive.

CONCLUSION

The Court of Appeals decision in this case regarding the tolling of prejudgment interest is clearly erroneous. MCLA 600.6013(5) provides for interest to run "from the date of filing the complaint to the date of satisfaction of the judgment" and allows for no exception. The language of the statute is clear and unambiguous and cannot be amended by the Courts.

The prejudgment interest was voluntarily paid by the Defendant and the amount and voluntary nature of the payment was detrimentally relied on by the Plaintiff. Allowing the Court of Appeals decision to stand will represent material injustice to the Plaintiff.

RELIEF REQUESTED

The Court of Appeals decision must be reversed as to prejudgment interest. The decision of the trial court must be affirmed.

Respectfully submitted,

MILLER, SHPIECE & TISCHLER, P.C.

BY: WAYNE J. MILLER P31112
Attorneys for Plaintiff
26711 Northwestern Hwy, Ste. 200
Southfield, MI 48034
(248) 945-1040

DATED: October 24, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MISSAUKEE

ALICE JO MORALES, as Guardian of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff,

v.

AUTO OWNERS INSURANCE COMPANY, a Michigan Corporation,

Defendant.

Case No. 92 2882-NF
Hon. Charles Corwin

Examined, entered & countersigned by me this 3-26-2001 a true copy
Clerk of Court

MILLER, SHPIECE & ANDREWS, P.C.
BY: WAYNE J. MILLER (P31112)
Attorneys for Plaintiff
26211 Central Park Blvd., Suite 500
Southfield, MI 48076
(248) 945-1040

BENSINGER, COTANT, MENKES & AARDEMA, P.C.
BY: DANIEL J. BEBBLE (P51257)
Attorneys for Defendant
308 West Main Street, Box 1000
Gaylord, MI 49735
(517) 732-7536

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT ON PREJUDGMENT INTEREST ENTERED ON SEPTEMBER 27, 2000 PURSUANT TO MCR 2.612(A) AND (C)

At a session of said Court held in the City of Cadillac, County of Missaukee, State of Michigan

on MARCH 23, 2001

PRESENT: HON CHARLES D. CORWIN
CIRCUIT COURT JUDGE

On motion of Defendant's counsel, BENSINGER, COTANT, MENKES & AARDEMA, P.C. by DANIEL J. BEBBLE, ESQ., the court having heard the argument of counsel and being fully advised in the premises;

IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment on Prejudgment Interest Entered on September 27, 2000 Pursuant to MCR 2.612(A) and (C) is **DENIED** for the reasons stated on the record;

IT IS FURTHER ORDERED THAT the Judgment in this matter is based on a written instrument within the meaning of MCL 600.6013(5), for which prejudgment interest accumulates at the rate of 12% compounded annually.

CIRCUIT COURT JUDGE

APPROVED AS TO FORM:

WAYNE J. MILLER P31112
Attorney for Plaintiff

DANIEL J. BEBBLE (P51257)
Attorney for Defendant

Consent re 3/12/01.

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STATE OF MICHIGAN

COURT OF APPEALS

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a legally incapacitated person, a/k/a ANTHONY MORALES,

Plaintiff-Appellee,

v

AUTO OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED
October 4, 2002

No. 233826
Missaukee Circuit Court
LC No. 92-002882-NF

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

A jury determined that defendant Auto Owners Insurance Company was estopped from canceling an insurance policy issued to plaintiff. Defendant appeals as of right the judgment ordering defendant to pay prejudgment interest, penalty interest, and attorney fees. We affirm in part, reverse in part, and remand.

This case was previously appealed to this Court[1] and to the Michigan Supreme Court, and a full discussion of the underlying facts is contained in the Supreme Court's opinion.[2] Relevant to this appeal, following remand by the Supreme Court, the parties stipulated that the medical expenses and services provided were reasonable and the case was submitted to a jury solely on the issue whether the policy was in effect at the time of plaintiff's accident. The jury concluded that defendant was estopped from canceling the policy. The trial court subsequently granted plaintiff's motion for "penalty" interest under MCL 500.3142 and attorney fees under MCL 500.3148. The judgment also provides for the payment by defendant of prejudgment interest.

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[1] *Morales v Auto-Owners Ins Co,* unpublished opinion per curiam of the Court of Appeals, issued September 3, 1996 (Docket No. 178479).

[2] *Morales v Auto-Owners Ins Co,* 458 Mich 288; 582 NW2d 776 (1998).

I. Penalty Interest

Defendant contends that the trial court erred by awarding penalty interest under MCL 500.3142(3). We disagree. The judge properly awarded penalty interest pursuant to MCL 500.3142. The clear language of the statute compels such interest regardless of the reasonableness of the insurer's decision to withhold benefits. *Davis v Citizens Ins Co*, 195 Mich App 323, 329; 489 NW2d 214 (1992). Defendant urges that the penalty interest should accrue from the date of the jury's verdict, not the date of the original complaint, because it was only then that it learned it was liable for the loss. We disagree, as defendant's interpretation would be contrary to the plain language of the statute. Moreover, while an insurer is entitled to contest payment of no-fault benefits, it assumes a risk that ultimately it will be liable for the benefits plus penalty interest. *Conway v Continental Ins Co*, 180 Mich App 447, 453; 447 NW2d 761 (1989). The risk of nonpayment also includes the inherent risk of litigation.[3]

Therefore, under the jury's verdict – which defendant does not challenge – the original policy of insurance continued in effect and defendant failed to pay benefits as required under the policy. Personal injury protection (PIP) benefits are overdue if an insurer fails to pay those benefits within thirty days after the insured provides "reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2).[4] Once defendant received reasonable proof of the fact and of amount of the loss sustained, it had to pay benefits or be subject to the penalties. *Cruz v State Farm Mut Auto Ins Co,* 466 Mich 588, 600; 648 NW2d 591 (2002). The trial court properly awarded penalty interest.

II. Prejudgment Interest

Defendant maintains that the trial court erred by awarding prejudgment interest pursuant to MCL 600.6013 during the four years this case was on appeal because the delay was not the fault of the insurer. We agree. Prejudgment interest does not continue to accrue during the appellate process. See *Dedes v Asch*, 233 Mich App 329, 340, 590 NW2d 605 (1998). We therefore remand this matter to the trial court for a redetermination of the amount of prejudgment interest for which defendant is liable.

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[3] Defendant's argument is premised on its view that the insurance policy had lapsed but that a new contract of insurance was created by the jury's verdict estopping defendant from denying coverage. This argument ignores our Supreme Court's determination in this case that application of the doctrine of equitable estoppel does not create a new contract of insurance, but rather merely prevents an insurer "from enforcing a single provision in the already existing contract." *Morales v Auto-Owners Ins Co,* 458 Mich 288, 298; 582 NW2d 776 (1998).

[4] Defendant does not dispute that plaintiff provided reasonable proof of the fact and of the amount of the loss sustained or that defendant failed to pay PIP benefits within thirty days of that date.

III. Attorney Fees

Lastly, defendant asserts that the trial court erred by awarding attorney fees to plaintiff under MCL 500.3148 for being forced to bring a motion for payment of penalty interest. MCL 500.3148(1) provides:

> An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection insurance benefits which are overdue. The attorney's fee shall be charged against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment.

The trial court's finding that an insurer unreasonably refused to pay benefits or unreasonably delayed in making proper payment will only be reversed if it is clearly erroneous. *Liddell v DAIIE,* 102 Mich App 636, 650; 302 NW2d 260 (1981). Where benefits are not paid within the statutory period, a rebuttable presumption of unreasonable refusal or undue delay arises. *Combs v Commercial Carriers, Inc,* 117 Mich App 67, 73; 323 NW2d 596 (1982).

The trial court's decision to award attorney fees was based on the fact that plaintiff was forced to bring a post judgment motion for payment of interest and was forced to defend defendant's post judgment motion for relief from judgment on prejudgment interest, a motion that encompassed a claim that defendant should not be compelled to pay interest. As we have determined, our Supreme Court held that if the jury determined that plaintiff could establish that defendant was estopped from denying coverage, the provisions of the insurance policy continued in effect. Under the plain statutory language, defendant would therefore be liable for its failure to timely pay benefits. The jury held that plaintiff proved that defendant was estopped from denying coverage; penalty interest was therefore due based on defendant's failure to timely pay. The trial court's determination that defendant was also liable for attorney fees was based on its conclusion that defendant's challenge to the payment of penalty interest was made without legal basis. We find no clear error in this determination.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

STATE OF MICHIGAN

SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

Plaintiff/Appellant,

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Lower Court No.: 92-2882 NF

Hon. Charles D. Corwin

/

MILLER, SHPIECE & ANDREWS, P.C.
WAYNE J. MILLER (P31112)
Attorney for Plaintiff/Appellee
27611 Northwestern Highway, Ste. 200
Southfield MI 48034
(248) 945-1040

DYKEMA GOSSETT PLLC
LORI M. SILSBURY (P39501)
Attorney for Defendant/Appellant
800 Michigan National Tower
Lansing MI 48933-1742
(517) 374-9100

/

NOTICE OF HEARING

TO: CLERK OF THE COURT AND ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that the attached **APPLICATION FOR LEAVE TO APPEAL** will be heard before the SUPREME COURT on **TUESDAY, NOVEMBER 19, 2002**, in the Supreme Court.

Respectfully submitted,
MILLER, SHPIECE & TISCHLER, P.C.

BY:_____
WAYNE J. MILLER (P31112)
Attorneys for Plaintiff/Appellant
27611 Northwestern Highway, Suite 200
Southfield, MI 48034
(248) 945-1040

Date: October 24, 2002

STATE OF MICHIGAN

SUPREME COURT

ALICE JO MORALES, as Guardian and Conservator of ANTONIO MORALES, a/k/a ANTHONY MORALES, a legally incapacitated person,

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MILLER, SHPIECE & ANDREWS, P.C.
WAYNE J. MILLER (P31112)
Attorney for Plaintiff/Appellee
27611 Northwestern Highway, Ste. 200
Southfield MI 48034
(248) 945-1040

DYKEMA GOSSETT PLLC
LORI M. SILSBURY (P39501)
Attorney for Defendant/Appellant
800 Michigan National Tower
Lansing MI 48933-1742
(517) 374-9100

/

PROOF OF SERVICE

STATE OF MICHIGAN)
OAKLAND COUNTY)

Robin R. Stewart, an employee of MILLER, SHPIECE & TISCHLER, P.C., being first duly sworn, deposes and says that on October 24, 2002, she served a copy of PLAINTIFF/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL and this PROOF OF SERVICE upon attorney Lori M. Silsbury, 800 Michigan National Tower, Lansing, Michigan 48933-1742, Missaukee County Circuit Court, 111 S. Canal, Lake City, MI 49651 and Michigan Court of Appeals, 109 W. Michigan Avenue, Lansing MI 48909 by enclosing copies of the same in envelopes properly addressed, and by depositing said envelopes in the United States Mail with postage thereon having been fully prepaid.

Robin R. Stewart

Subscribed and sworn to before
me on this 24th day of October, 2002.

Linda Frey

Linda Frey, Notary Public
Oakland County, Michigan.
My Commission Expires: 7/01/03

Wayne J. Miller
Michael R. Shpiece
Ronni Tischler
Carrie Kennedy
Ellen C. Busch
Maureen H. Kinsella

MST

MILLER, SHPIECE & TISCHLER, P.C.
ATTORNEYS AT LAW
26711 Northwestern Hwy., Suite 200
Southfield, Michigan 48034
248/945-1040 PH • 248/945-1566 FX
EMAIL: msapc@msapc.net
www.lawyers.com/msapc-law • www.no-faultlaw.com

Of Counsel
Lori-Ann Rickard

Brenda Kaplan
Paralegal

October 24, 2002

VIA HAND DELIVERY

Clerk of Court
Michigan Supreme Court
925 W. Ottawa Street
4th Floor
Lansing MI 48993

Re: Alice Jo Morales v Auto Owners Insurance Company
Missaukee County Circuit Court Case No.: 92-2882-NF
Court of Appeals Docket No.: 233826
Our File No.: 628.01

Dear Clerk:

Enclosed for filing in your usual manner please find an original and seven additional copies of our Notice of Hearing, Plaintiff/Appellant's Application for Leave to Appeal, Notice of Hearing, and Proof of Service, along with our check number 24534 in the amount of $250.00.

Thank you for your attention in this matter.

Very truly yours,

MILLER, SHPIECE & TISCHLER, P.C.

Wayne J. Miller lrrs

WAYNE J. MILLER
WJM/rrs
Enclosure
cc: Lori M. Silsbury (w/enclosure)
Court of Appeals Clerk
Missaukee County Circuit Court Clerk

RECEIVED
OCT 24 2002
CORBIN R. DAVIS
CLERK SUPREME COURT

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